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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

- - - - -X
UNITED STATES OF AMERICA 18-CR-6094(G)
vs.
CARLOS FIGUEROA, XAVIER TORRES, Rochester, New York
AND JEAN KARLOS PIZZARO, December 4, 2020
Defendants. 12:10 p.m.
- - - - -X

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE FRANK P. GERACI, JR.
UNITED STATES DISTRICT JUDGE

JAMES P. KENNEDY, JR., ESQ.
United States Attorney
BY: KATYLYN HARTFORD, ESQ.
CASSIE M. KOCHER, ESQ.
ROBERT MARANGOLA, ESQ.
Assistant United States Attorneys
500 Federal Building
Rochester, New York 14614
Appearing on behalf of the United States

MAURICE J. VERRILLO, ESQ.
Appearing on behalf of Xavier Torres

MATTHEW LEMBKE, ESQ.
Appearing on behalf of Jean Karlos Pizzaro

PAUL VACCA, ESQ.
Appearing on behalf of Carlos Figueroa

ALSO PRESENT: Nicolas Penchaszadeh, Spanish Interpreter

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P R O C E E D I N G S

* * *

(WHEREUPON, all defendants are present).

THE CLERK: This is 18-CR-6094, U.S. vs. Carlos Figueroa, Xavier Torres, and Jean Karlos Pizzaro.

Rob Marangola is here for the Government. Cassie Kocher and Katie Hartford are also here for the Government.

Paul Vacca is here for defendant Carlos Figueroa.

Maurice Verrillo is here for defendant Xavier Torres.

And Matt Lembke is here for defendant Pizzaro.

Nicolas Penchasadeh is here as an interpreter. We're here today for status.

THE COURT: Thank you. Could you first of all swear in the interpreter?

THE CLERK: Sure. Nicolas, would you raise your right hand?

(WHEREUPON, the interpreter was sworn).

THE COURT: Thank you. Are you Xavier Torres?

DEFENDANT TORRES: Yes.

THE COURT: Are you Jean Karlos Pizzaro?

DEFENDANT PIZZARO: Yes.

THE COURT: And are you Carlos Javier Figueroa?

DEFENDANT FIGUEROA: Yes, Your Honor.

THE COURT: Mr. Torres, Mr. Pizzaro, and then

1 Mr. Figueroa, are you consenting to have this matter heard by
2 way of video conference?

3 First of all, Mr. Torres?

4 **DEFENDANT TORRES:** Yes.

12:12:19PM 5 **THE COURT:** And Mr. Pizzaro?

6 **DEFENDANT PIZZARO:** Yes.

7 **THE COURT:** And Mr. Figueroa?

8 **DEFENDANT FIGUEROA:** Yes, Your Honor.

9 **THE COURT:** I do remind the parties that part of
12:12:34PM 10 this conference is by way of video conference. That you
11 cannot record, rebroadcast or reproduce any part of this
12 hearing. To do so would violate the Court's order, could
13 result in a contempt of court.

14 This matter's on for a pretrial conference. The
12:13:03PM 15 trial is scheduled for January 4th of 2020.

16 Mr. Lembke, you did send a letter to the Court
17 yesterday. Do you want to be heard on that?

18 **MR. LEMBKE:** I do, Your Honor.

19 Your Honor, I believe that the Court is aware of
12:13:39PM 20 the current information -- public information concerning
21 what's described as a surge or a spike in Covid 19 cases and
22 the Coronavirus.

23 I recently heard this morning, in fact, on NPR News
24 that the head of the Center for Disease Control of the United
12:14:08PM 25 States Government has indicated that the surge across the

1 United States will not reach peak for several more weeks,
2 which would put us right at around Christmas time.

3 **THE COURT:** Mr. Lembke, let me cut you off for a
4 second.

12:14:27PM 5 Nicolas, are you simultaneously interpreting?

6 **INTERPRETER PENCHASADEH:** I am not, Your Honor.

7 **THE COURT:** You'll have to slow down, Mr. Lembke,
8 let him catch up.

9 Go ahead, Mr. Lembke.

12:14:52PM 10 **MR. LEMBKE:** And my understanding of the science
11 is -- my understanding of the science is -- are we -- can you
12 hear me?

13 **THE COURT:** Yes.

14 **THE CLERK:** He's waiting for Nicolas too.

12:15:20PM 15 **THE INTERPRETER:** Keep going, Matt, and I will --

16 **MR. LEMBKE:** All right. My understanding of the
17 science is that hospitalizations and positive Covid results
18 lag behind the peak in the surge by at least two weeks. That
19 would put us right at the time when we are starting our jury
12:16:04PM 20 selection for trial.

21 In the meantime, the attorneys both for the
22 Government and for the defense will be involved in trial
23 preparation over the next month or so. This will require us
24 to have contact with a number of people outside of our
12:16:49PM 25 offices, including support staff, witnesses, experts,

1 investigators, paralegals and others.

2 It usually requires in other circumstances that the
3 attorneys meet with each other to discuss trial strategy or
4 preparation and, most importantly, it involves us having to
12:17:49PM 5 meet frequently with our clients at jails and other
6 (indiscernible audio).

7 I think the Court is aware that this morning's
8 appearance ran into a bit of a snag. That is because
9 Mr. Pizzaro, who is at the Monroe County Jail, is on a floor
12:18:32PM 10 that has been ordered quarantined.

11 That had an impact not only on the Court having to
12 readjust -- as I understand it, the Court having to readjust
13 the logistics of this Zoom appearance, but it also had an
14 impact on me.

12:19:14PM 15 Mr. Pizzaro is a Spanish speaking client. I need
16 to coordinate with a Spanish language interpreter any time I
17 want to meet with him or speak with him.

18 It was my intention and desire to meet with him
19 this week prior to today's conference, but because of my
12:19:51PM 20 schedule and our interpreter's schedule, we were not able to
21 meet with Mr. Pizzaro on Wednesday or Thursday, yesterday.

22 As a result, yesterday -- it's been (indiscernible
23 audio) among Mr. Pizzaro, Mr. Barberia and me this morning at
24 11 a.m.

12:20:28PM 25 **THE INTERPRETER:** Sorry, Mr. Lembke, I could not

1 catch that. There was a lot of background noise.

2 **MR. LEMBKE:** As a result, I contacted the Monroe
3 County Jail to set up a telephone conference among
4 Mr. Pizzaro, Mr. Barberia and me for 11 o'clock this morning.

12:21:01PM 5 In the meantime, Mr. Pizzaro was placed in
6 quarantine. That instance made it impossible for me to have a
7 telephone conference with him this morning for court.

8 I think that that is a good example of the type of
9 practical problems that will cause throughout the trial if we
10 go forward on January the 4th, 2021.

11 I also want to address with the Court the fact that
12 as we are preparing to assemble for court on January the 4th,
13 we will have -- it's my estimation, and I discussed this with
14 other counsel -- every day, including court staff, Government
12:22:36PM 15 attorneys, case agents, defense lawyers, interpreters, United
16 States Marshal's Service, and court security officers, plus
17 the jury more than 30 people in the courtroom at a minimum
18 every day. And in fact that number could be as many as 33 or
19 35.

12:23:35PM 20 I also understand that the Southern District of
21 New York, the Northern District of New York, and the Eastern
22 District of New York have each entered district-wide orders
23 postponing jury trials until at least January 15th, 2021.

24 Based upon my understanding of what I have read and
12:24:20PM 25 have seen about the scientific information and medical

1 information available today and what's expected to occur
2 across the country over the next several weeks, it's my
3 opinion, I think, that it is highly likely, if not a
4 certainty, that those districts will extend their order
12:24:48PM 5 delaying jury trials for -- to a date beyond January 15th.

6 **THE COURT:** Mr. Lembke, based upon all that, I
7 assume you're requesting an adjournment of the trial?

8 **MR. LEMBKE:** I am, Your Honor.

9 **THE COURT:** Let me hear from Mr. Vacca.

12:25:25PM 10 **MR. VACCA:** Your Honor, I would join in that motion.
11 It's very difficult to prepare for trial when you can't meet
12 with other counsel or you can't meet with your client.

13 My client is currently in the Yates County Jail.
14 I'm having to speak to him on the phone. I need face-to-face
12:25:42PM 15 meetings.

16 And basically in terms of client -- contact with
17 clients in the Monroe County Jail is zero. You can have no
18 contact with them. Might be able to squeeze out a 15 minute
19 conference with them every three or four days, but I have no
12:25:59PM 20 way of really meeting with my client or other counsel.

21 And it's dangerous. That's the plain bottom line
22 is it's dangerous and it's expected to accelerate and it will
23 take our mind off the trial.

24 I did, in fact, try a murder case in state court
12:26:15PM 25 that lasted three weeks, and it was -- to use a nice word --

1 it was a nightmare to try the case.

2 The Governor had limited it to a number of people
3 in the courtroom and the trial actually exceeded that so...

4 **THE COURT:** I'm sorry, the interpreter needs to
12:26:37PM 5 catch up here. Thank you.

6 **MR. VACCA:** There were practical difficulties in
7 trying that case.

8 Also, there's been an acceleration because of
9 Halloween. Then there was another acceleration because of
12:27:11PM 10 Thanksgiving. Now we have Christmas coming and there's going
11 to be another acceleration, I assume. And New Year's is going
12 to come up and another acceleration. Then you get into
13 Valentine's Day, which I don't want to get into right now.

14 But I do think we need an adjournment until at
12:27:26PM 15 least the end of February, probably into March because you
16 have to vaccinate a certain number of people before that takes
17 effect.

18 So I join in Mr. Lembke's motion.

19 **MR. LEMBKE:** Paul, slow down.

12:27:39PM 20 **MR. VACCA:** Okay, okay. So I join in Mr. Lembke's
21 motion.

22 **THE COURT:** Thank you. Mr. Verrillo?

23 **MR. VERRILLO:** Yes, Your Honor. I join in that
24 motion. I would point out that we're gonna need time to
12:28:05PM 25 review the *Jencks* material with our clients and obviously

1 there's gonna be practical difficulties in doing that.

2 So I would join in that request.

3 **THE COURT:** Thank you. Mr. Marangola?

4 **MR. MARANGOLA:** Judge, I've spoken to counsel about
12:28:22PM 5 the request that they're making, and I don't disagree with any
6 of the factual representations that they've provided, and the
7 Government does not have an objection to adjourning the trial.

8 The Government would, of course, agree to provide
9 *Jencks* material 30 days before trial, whatever trial date the
12:28:40PM 10 Court ends up setting.

11 **THE COURT:** Thank you. Obviously the Court is very
12 aware of the situation in this community both in the Buffalo
13 and Rochester regions. The number of cases in both regions
14 has increased significantly over the past month.

15 In addition, the number of hospitalizations and the
16 use of intensive care unit beds has increased significantly.

17 For example, I'm aware in Rochester that during
18 April and May there were approximately 24 to 27 ICU beds being
19 utilized. And as of yesterday, my understanding is that there
12:30:07PM 20 were some 96 ICU beds being utilized in the Rochester region
21 alone.

22 That the number of cases has increased from some
23 200 a day in March and April to over 600 a day as of
24 yesterday.

12:30:44PM 25 That the positive activity rate at least in Monroe

1 County and also my understanding Erie County exceeds 7%.

2 That the Monroe County Jail and the
3 Chautauqua County Jail are experiencing a very significant
4 uptick in the number of infections.

12:31:19PM 5 In those facilities my understanding is that both
6 staff and inmates have been found to be positive with the
7 virus, and significant numbers in both facilities have needed
8 to be quarantined.

9 This situation makes it nearly impossible for
10 counsel to meet with their clients.

11 Also, as indicated by Mr. Lembke, based upon the
12 situation in the community, it's difficult to meet with
13 witnesses and investigators and other attorneys.

14 The date for the trial of January 4th is only 30
12:32:29PM 15 days from today. And all the information that's been publicly
16 disseminated indicates that this Coronavirus situation is only
17 going to increase over the next 30 days as opposed to
18 decrease.

19 Although there is word about a vaccine, the
12:33:05PM 20 indication is that distribution -- although it may begin in
21 December, will probably not be completed until some time next
22 summer of 2021.

23 Based upon all that the Court agrees that the
24 situation is such that it would be dangerous and also
12:33:43PM 25 impractical for counsel to prepare for trial in January of

1 2021.

2 Although we obviously have no idea when this
3 situation will be alleviated, it will certainly be several
4 months from now.

12:34:24PM 5 And, therefore, the Court is going to grant the
6 application for an adjournment, which all counsel have agreed
7 to. And I also need to hear from each defendant that they
8 also agree to the adjournment of this matter.

9 First of all, Mr. Torres, do you agree with your
12:34:52PM 10 attorney's request for an adjournment of this trial?

11 **DEFENDANT TORRES:** Yes, sir.

12 **THE COURT:** And, Mr. Pizzaro, do you agree to the
13 adjournment of this trial as requested by your attorney
14 Mr. Lembke?

12:35:12PM 15 **DEFENDANT PIZZARO:** Yes, sir.

16 **THE COURT:** And, Mr. Figueroa, do you also agree to
17 adjournment of this trial which has been requested by your
18 attorney Mr. Vacca?

19 **DEFENDANT FIGUEROA:** So yes --

12:36:16PM 20 **THE COURT:** Mr. Figueroa, slow down a second so the
21 interpreter can catch up here.

22 **THE INTERPRETER:** So, yes, I do agree, Your Honor.

23 I do want to say, however, that as you stated, you
24 know, the numbers are going up in the jails and that causes
12:36:35PM 25 some concern. So I don't know if there's a chance to have a

1 possibility of bail or a way that we could spend the holidays
2 with our families at home.

3 **THE COURT:** Okay, obviously any bail application
4 would have to be made by counsel. That's not before me at
12:36:56PM 5 this point.

6 **DEFENDANT FIGUEROA:** My attorney had requested bail
7 and it was denied, but I was not told why it was denied or why
8 conditions were not able to be imposed.

9 I was able -- I did serve under the ankle bracelet
12:38:03PM 10 with electronic monitoring without any problems, but I was not
11 told why my bail motion was denied.

12 **THE COURT:** Okay, thank you.

13 If an application is made by any counsel, obviously
14 I'll consider that, but that's not before me at this point.

12:38:20PM 15 Based upon -- the Court is going to reschedule this
16 jury trial for jury selection to begin on March 15th, 2021 at
17 8:30 a.m..

18 Now, as I indicated -- go ahead.

19 And, of course, that's assuming that the situation
12:38:58PM 20 is such by then and prior to that time that allows counsel to
21 properly prepare for this trial. So an additional application
22 could be heard if the situation remains as dire as it is at
23 this time.

24 But it appears that March date appears to be
12:39:21PM 25 reasonable at this time.

1 Mr. Lembke, do you have any objection to the
2 exclusion of speedy trial time between now and March 15th at
3 8:30?

4 **MR. LEMBKE:** No, Your Honor.

12:40:10PM 5 **THE COURT:** I'm sorry, Mr. Lembke, did you say no?

6 **MR. LEMBKE:** I said no, I have no objection to it,
7 Your Honor.

8 **THE COURT:** Okay, thank you. Mr. Vacca?

9 **MR. VACCA:** No objection, Your Honor.

12:40:21PM 10 **THE COURT:** Okay. Mr. Verrillo?

11 **MR. VERRILLO:** No objection.

12 **THE COURT:** Government?

13 **MR. MARANGOLA:** No objection, Your Honor.

14 **THE COURT:** Based upon the reasons just stated by
12:40:31PM 15 the Court and at the request of counsel, the consent of all
16 counsel, is very reasonable in this case that the matter be
17 adjourned to March 15th at 8:30 for jury selection, the time
18 period between today and March 15th be excluded in the
19 interest of justice. Therefore, the speedy trial period is
12:41:15PM 20 excluded between today and March 15th, 2021.

21 Now, obviously we're all hopeful that the situation
22 will change in our community that we can keep that date, but
23 if the situation does not get better, I will certainly
24 entertain any additional requests of counsel.

12:41:57PM 25 Another issue pending before the Court is a motion

1 made on behalf of the defendant Xavier Torres to sever his
2 matter from the other co-defendants.

3 The Court's reviewed the motion and the response by
4 the Government. The basis for the motion being an alleged
12:42:41PM 5 statement by the defendant that does implicate a co-defendant.

6 The Government's indicated that they intend to make
7 the appropriate redactions to eliminate any reference to a
8 co-defendant. That would alleviate any *Bruton* issue that
9 would be raised.

12:43:38PM 10 The Court finds that based upon those
11 representations, that the motion to sever should be denied.

12 And, Mr. Verrillo, obviously I'll note your
13 exception to that ruling.

14 **MR. VERRILLO:** Yes, Your Honor.

12:44:03PM 15 **THE COURT:** Okay. There's a second motion by the
16 defendant Torres for the production of personnel records of
17 law enforcement officers.

18 The Government has responded that they will
19 continue to request any potential impeachment material related
12:44:53PM 20 to the personnel files of such witnesses when it discloses
21 Jencks Act material.

22 And, therefore, I believe that is sufficient, and
23 the motion for further production is denied.

24 Finally, there's a motion for additional
12:45:33PM 25 information regarding what's been disclosed by the Government

1 regarding the homicide of John Gonzalez.

2 The Government's indicated they have provided
3 defense counsel with an unredacted copy of the police reports
4 regarding that matter.

12:46:18PM 5 The Court finds that that disclosure is sufficient,
6 and any motion for additional information at this time is
7 denied.

8 Mr. Verrillo, the Court will obviously note your
9 objection to both of those rulings.

12:46:52PM 10 And also obviously if there's new information and
11 any of those motions need to be remade, the Court will
12 entertain such motions at a later time.

13 Okay, anything further from the Government?

14 **MR. MARANGOLA:** No, thank you, Your Honor.

12:47:18PM 15 **THE COURT:** Anything further, Mr. Lembke, on behalf
16 of Mr. Pizzaro?

17 **MR. LEMBKE:** No, Your Honor.

18 **THE COURT:** Thank you. Mr. Vacca, on behalf of
19 Mr. Figueroa?

12:47:41PM 20 **MR. VACCA:** Nothing further at this point, Your
21 Honor.

22 **THE COURT:** Okay. Mr. Verrillo, on behalf of
23 Mr. Torres?

24 **MR. VERRILLO:** Your Honor, I just want to say I
12:47:55PM 25 understand the Government is continuing to investigate that

1 Ruben Gonzalez matter and they will supplement if they get
2 further information. So that's my understanding, if there's
3 any further information they will provide that to me in the
4 interim.

12:48:08PM 5 **THE COURT:** Is that correct, Mr. Marangola?

6 **MR. MARANGOLA:** Yes, Judge.

7 **THE COURT:** Okay. All right, I think we're all set.
8 Thank you very much.

9 Monroe County, I want to thank you for your helping
12:48:31PM 10 set this up, and also Yates County for setting up this video
11 conference. You've been very cooperative. I know it's --
12 you've had some serious situations going on at both those
13 facilities, so we appreciate your help and cooperation.

14 **MONROE COUNTY JAIL DEPUTY:** You're welcome, Your
12:48:57PM 15 Honor.

16 **YATES COUNTY JAIL DEPUTY:** Ditto.

17 **THE COURT:** Take care. Thank you. Be safe.

18 **THE INTERPRETER:** Your Honor, Mr. Figueroa wanted to
19 say something.

12:49:10PM 20 **THE COURT:** Mr. Figueroa, I think you really need to
21 talk to Mr. Lembke (sic), you know, before you say things. I
22 think the only question I asked you was to be sure that you
23 did agree to the adjournment and waive speedy trial.

24 I'm not sure what you're gonna say, but I think
12:49:27PM 25 Mr. Lembke (sic) might be a little concerned about you

1 speaking without first consulting with him, okay? For your
2 own good.

3 **MR. VACCA:** Your Honor, that is my client.

4 **THE COURT:** I'm sorry, Mr. Vacca.

12:49:40PM 5 **MR. VACCA:** I'll call him at the jail this weekend
6 and speak to him.

7 **DEFENDANT FIGUEROA:** I would like to talk to my
8 attorney. It's just about your orders denying our motion, but
9 I will talk to my attorney.

12:50:14PM 10 **THE COURT:** Okay, great. Thank you very much.
11 Okay, thank you.

12 **MR. MARANGOLA:** Thank you, Judge.

13 (**WHEREUPON**, proceedings adjourned at 12:50 p.m.)

14 * * *

15 **CERTIFICATE OF REPORTER**

16
17 In accordance with 28, U.S.C., 753(b), I certify that
18 these original notes are a true and correct record of
19 proceedings in the United States District Court for the
20 Western District of New York before the Honorable Frank P.
21 Geraci, Jr. on December 4th, 2020.

22
23 S/ Christi A. Macri

24 Christi A. Macri, FAPR-RMR-CRR-CSR(CA/NY)
25 Official Court Reporter